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6 UNITED STATES DISTRICT COURT  
7 WESTERN DISTRICT OF WASHINGTON  
8 AT TACOMA

9 HENRY E. YOUNG,

10 Plaintiff,

11 v.

12 CLALLAM BAY CORRECTIONS CENTER,  
13 *et al.*,

14 Defendants.

No. 08-5717RJB/JRC

REPORT AND RECOMMENDATION

NOTED FOR:  
June 19, 2009

15 This 42 U.S.C. § 1983 Civil Rights action has been referred to the undersigned  
16 Magistrate Judge pursuant to 28 U.S.C. §§ 636(b)(1)(A) and 636(b)(1)(B) and Local Magistrate  
17 Judges' Rules MJR 1, MJR 3, and MJR 4. Plaintiff is proceeding *in forma pauperis* (Dkt. # 4).  
18 Before the Court is defendant's motion to dismiss for failure to exhaust administrative remedies  
19 (Dkt. # 12). Having reviewed the complaint, the motion to dismiss with its attachments, and the  
20 response, the court recommends that the motion be GRANTED and that this action be  
21 DISMISSED WITHOUT PREJUDICE for failure to exhaust administrative remedies prior to  
22 filing the action.  
23

24 FACTS

25 Plaintiff is a Washington State inmate. He alleges the named defendants took seventy-  
26 five dollars from the wrong account to pay a postage bill (Dkt. # 5). Defendants move to dismiss  
Report and Recommendation- 1

1 for failure to exhaust administrative remedies (Dkt # 12). Plaintiff did not respond to the motion.  
2 Defendants have offered the affidavit of Devon Schrum. The affidavit states that plaintiff did not  
3 exhaust his grievance regarding this incident (Dkt. # 12, exhibit 1).

#### 4 STANDARD OF REVIEW

5 The burden of pleading and proving failure to exhaust administrative remedies in the civil  
6 rights context is normally defendants. The court may consider evidence outside the pleading  
7 without converting the motion to a motion for summary judgment. Wyatt v. Terhune, 315 F3d.  
8 1108 (9th Cir. 2003). A motion to dismiss for failure to exhaust administrative remedies falls  
9 within the unenumerated motions in FRCP 12(b).  
10

#### 11 DISCUSSION

12 The Prison Litigation Reform Act ("PLRA") requires exhaustion of administrative  
13 remedies prior to filing a complaint in federal court. The relevant portion of the act states:  
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15 No action shall be brought with respect to prison conditions under  
16 section 1983 of this title, or any other Federal law, by a prisoner  
17 confined in any jail, prison, or other correctional facility until such  
18 administrative remedies as are available are exhausted.

19 42 U.S.C. § 1997e(a).

20 The act applies to plaintiff. The United States Supreme Court determined that Congress  
21 enacted the provision in order to reduce the quantity and improve the quality of prisoner suits.  
22 Porter v. Nussle, 534 U.S. 516 (2002). By mandating exhaustion, Congress enabled corrections  
23 officials to address prisoner complaints internally. Where exhaustion was once discretionary, it  
24 is now mandatory. "All 'available' remedies must now be exhausted; those remedies need not  
25 meet federal standards, nor must they be 'plain, speedy, and effective.'" Porter v. Nussle, 534  
26 U.S. 516 (2002) (quoting Booth v. Churner, 532 U.S. 731, 739 (2001)). The Porter Court ruled

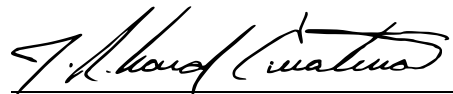
1 that “§ 1997e(a)’s exhaustion requirement applies to all prisoners seeking redress for prison  
2 circumstances or occurrences.” Porter, 534 U.S. at 520.

3 There is nothing contained in the complaint or any of the pleadings to prove that Plaintiff  
4 failed to exhaust Administrative remedies. Therefore, the court concludes that Plaintiff has  
5 failed to exhaust available remedies prior to filing this action. Accordingly, this action should be  
6 **DISMISSED WITHOUT PREJUDICE.**

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8 CONCLUSION

9 This Court recommends that the motion to dismiss for failure to exhaust administrative  
10 remedies be GRANTED. This dismissal should be DISMISSED WITHOUT PREJUDICE and  
11 would not count as a strike pursuant to 28 U.S.C. 1915(g). Pursuant to 28 U.S.C. § 636(b)(1)  
12 and Rule 72(b) of the Federal Rules of Civil Procedure, the parties shall have ten (10) days from  
13 service of this Report to file written objections. *See also*, Fed. R. Civ. P. 6. Failure to file  
14 objections will result in a waiver of those objections for purposes of appeal. Thomas v. Arn, 474  
15 U.S. 140 (1985). Accommodating the time limit imposed by Rule 72(b), the clerk is directed to  
16 set the matter for consideration on **June 19, 2009**, as noted in the caption.

17  
18 DATED this 26<sup>th</sup> day of May, 2009.

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21 J. Richard Creatura  
22 United States Magistrate Judge  
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